STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MICHIGAN TOOLING ASSOCIATION
WORKERS' COMPENSATION FUND,
in its own right and as Subrogee of
DISTEL TOOL & MACHINE CO.,

Plaintiff-Appellee,
-vs-

SC Case No: 127834
COA Case No: 249013
Lower Court No: 01-030684-CK

FARMINGTON INSURANCE AGENCY, L.L.C.,

Defendant-Appellant,

MACHINERY MAINTENANCE
SPECIALISTS, INC.,

Defendant,
and

FARMINGTON INSURANCE AGENCY, L.L.C.,

Third Party Plaintiff-Appellant,
-vs-

EMPLOYERS INSURANCE OF WAUSAU,
a Mutual Company, and WAUSAU
INSURANCE COMPANIES,

Third Party Defendants-Appellees.

127834

REPLY BY THE DEFENDANT-APPELLANT, FARMINGTON INSURANCE AGENCY, LLC, TO THE SUPPLEMENTAL BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF-APPELLEE

PROOF OF SERVICE

Respectfully submitted:
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STATEMENT OF FACTS

In its Supplemental Brief submitted pursuant to the Court's Order of October 7, 2005, and in response to the Supplemental Brief filed on behalf of the Defendant-Appellant, FARMINGTON INSURANCE AGENCY, LLC (hereinafter "FIA"), Plaintiff-Appellee, MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND (hereinafter "Michigan Tooling"), asserts that the Supreme Court is operating under the "mistaken belief" that there was no direct contact between FIA and Plaintiff's subrogor, DISTEL TOOL AND MACHINE COMPANY (hereinafter "Distel Tool"), with respect to Distel Tool's procurement of a certificate of insurance dated March 6, 1998, and previously issued by FIA to David Friedman, Inc., a client of MACHINERY MAINTENANCE SPECIALIST, INC. (hereinafter "Machinery Maintenance"). According to Michigan Tooling, this "mistaken belief" is the result of FIA's "inaccurate" recitation of the underlying facts, as well as the factual "misapprehensions" of both the Trial Court and the Court of Appeals. Michigan Tooling insists that the evidence at trial demonstrates that FIA directly supplied Distel Tool with a copy of the certificate previously faxed by FIA to David Friedman, because Distel Tool's copy bears reproduction of handwritten comments by FIA staff.

This Court should firmly reject Michigan Tooling's attempts to "spin" the evidence at trial in a desperate, yet misguided, attempt to dodge this Court's recognition of error in the proceedings below. For, an objective and accurate review of the actual proceedings reveals the following facts.

First, the record of the bench trial in this matter establishes that, as a matter of undisputed fact, there was never any direct contact between FIA and Distel Tool, and that Distel Tool received a copy of the certificate of insurance directly from Arnold Primak of Machinery Maintenance.

Specifically, the unrebutted testimony of FIA owner David Clappison and employee Rebecca Steingold was that:

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1. On March 6, 1998, insured Arnold Primak requested that a certificate of insurance regarding his workers' compensation policy with Wausau Insurance Companies be sent to prospective client David Friedman, Inc.;

2. The original certificate was mailed, as is, to David Friedman, Inc.;

3. Ms. Steingold also arranged for the agency's copy of the certificate to be immediately transmitted to David Friedman via facsimile;

4. Upon transmittal of the facsimile, Ms. Steingold noted that the facsimile transaction "#171" and "success"; and,

5. Ms. Steingold then photocopied the agency's copy of the certificate and mailed the photocopies to Arnold Primak, Wausau Insurance Company, and the Michigan Department of Consumer and Industry Services.

(Tr. 2/22/02, pp 160-161; 4/8/02, p 15; 8/28/02, pp 140-143)

The unrebutted and consistent testimony of Clappison and Steingold also established that:

1. FIA policies and procedures did not permit the agency to provide Distel Tool with a copy of their certificate previously issued to David Friedman;

2. Neither Mr. Clappison nor Ms. Steingold provided Distel Tool with a copy of the certificate previously issued to David Friedman;

3. There was no record in FIA files that, prior to April 1, 1998, FIA supplied Distel Tool with a copy of the certificate issued to David Friedman on March 6, 1998; and

4. FIA had no knowledge that Distel Tool received a copy of the March 6, 1998 certificate from Arnold Primak until after Mr. Primak's employee was injured at Distel Tool on April 1, 1998.

(Tr. 2/22/02, pp 156, 165-168; 4/8/02, pp 18, 36, 38, 57-60, 72; 8/28/02, pp 59, 150)

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Richard Distel, president of Distel Tool, confirmed in his trial testimony that:

1. He received a copy of the certificate of insurance previously issued to David Friedman on March 6, 1998, directly from Arnold Primak, and not from FIA;

2. He had no relationship, no contact, or no knowledge of FIA at the time he received the certificate of insurance; and,

3. The certificate language precluded any guarantee that Machinery Maintenance had workers' compensation insurance in effect after March 6, 1998.

(Tr. 6/19/02, pp 10-11, 14-17)

Mr. Distel's exact and unrebutted testimony:

Q Let me if I can hand you what we've already had marked as plaintiff's Exhibit G, G like great. Do you see that exhibit, sir?
A Yes, sir I do.
Q Was that the certificate that came to you from Mr. Primack?
A Yes, it is.

* * *

Q You understand that a certificate of insurance, did you understand that a certificate of insurance cannot guarantee or represent insurance would exist in the future?
A Well, I suppose, yeah.
Q You understand, I presume that over the course of time your company has had to buy insurance?
A Certainly.
Q And over the course of time you've probably paid premiums over the course of installments?
A Right.
Q And you understood that one of the conditions of maintaining your insurance in effect was to continue to pay the premiums?
A Correct.
Q And if you don't pay premiums, insurance companies aren't generally friendly people and they cancel coverage?
A Correct again.
Q And that was all known and understood by you back in March of 1998?
A Certainly.
Q And you understood that the obligation to pay the premiums and keep the coverage in effect belong with MMS?

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A Yes.
Q For MMS' insurance policy?
A I would say so, yeah.
Q All right. And in the event that something happened and MMS did not pay their premiums on a policy of insurance for workers' comp after the date of Exhibit G, March 6, 1998 then it was possible that there would be no insurance coverage. You understood that back then?
A I don't think I thought about it, but it certainly makes sense, yeah.
Q Okay. You understand that now and would agree with that?
A Right.
Q Okay. As I understand your testimony you specifically requested of Mr. Primack that he provide Distel Tool with a certificate of insurance?
A Right.
Q And it's your understanding and belief that the certificate of insurance that we've marked as Exhibit G and that was received by your company was delivered by Mr. Primack or someone at MMS?
A Right.
Q And it's also true that at no time between the time that you had the conversation with Mr. Primack advising him that the certificate of insurance, the most recent certificate of insurance that you had was stale and that you needed a new one. Up until the time that you received one that you did not deal or contact or communicate with Farmington Insurance Agency?
A No.
Q Is that correct?
A No, I did not.
Q What I said is correct?
A At no time did I talk to Farmington, no.
Q Is that correct?
A That's correct. I don't even know who they are.
Q Okay. You had had no prior relationship with Farmington Insurance Agency?
A No.
Q As a matter of fact, you just said you didn't even know who they were?
A No, I've never had any deals with them.
Q All right. Didn't know of their existence?
A Right.

(Tr. 6/19/02, pp 10-11, 14-17, emphasis supplied)

Given the actual evidence presented at trial, the only available conclusion is that Arnold Primak of Machinery Maintenance provided Distel Tool with a photocopy of the certificate copy Primak previously received from FIA, and Primak's copy was made from the agency

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copy, which included Ms. Steingold's handwritten notations regarding the successful facsimile transmission to David Friedman.

Therefore, as part of its findings of fact and conclusions of law, the Trial Court correctly determined that "Primak provided a photocopy of a Certificate of Insurance [to Distel Tool] with Friedman shown as the Certificate holder." (Opinion and Order dated 12/13/02, p 4) The Trial Court also expressly determined that FIA did not promise to do, or actually do anything directly for, Distel Tool:

> ...Richard Distel admitted in his trial testimony that he had no contact whatsoever with FIA and, in fact, was unfamiliar with FIA. Distel asked Primak to obtain the Certificate of Insurance and that Certificate was delivered to Distel by Primak, the owner of MMS, and not by FIA.
>
> Furthermore, the Certificate of Insurance relied upon by Distel, did not identify Distel as the Certificate holder. Both David Clappison and Becky Steingold, employees of FIA, testified that they were totally unaware of the existence of Distel. Furthermore, they had not been asked by Primak to issue the Certificate of Insurance for Distel.

(Opinion and Order dated 12/13/02, p 8)

Notwithstanding its acknowledgment of no direct contact between Distel Tool and FIA, or no direct representations or communications by FIA to Distel, the Trial Court went on to determine that FIA owed and breached the duty of care to Distel Tool regarding the issuance of the certificate, and that FIA was solely to blame for all Distel Tool's damages, to wit: payment of workers' compensation benefits to an employee of Machinery Maintenance. (Opinion and Order dated 12/13/02, pp 9-13)

When the Defendant FIA filed a claim of appeal from the portions of the Opinion and Order dated 12/13/02, resulting in a final judgment dated May 28, 2003, Plaintiff did not file a claim of cross appeal from the Trial Court's finding of fact regarding how Distel Tool obtained the certificate of insurance. Plaintiff Michigan Tooling only cross-appealed the Trial Court's decision during trial

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to grant FIA's motion, pursuant to MCR 2.118(C)(1), for leave to amend its original Answer to conform to the proofs at trial, specifically: to admit that FIA issued a certificate of insurance on March 6, 1998 to David Friedman, Inc., but to deny that it ever provided a copy of that certificate directly to Distel Tool. (Cross-Appeal dated 4/3/03. See also: Tr. 8/28/02, pp 80-85, 88)

The record at trial demonstrates that leave to amend was granted to FIA only after:

1. Plaintiff failed to object to the introduction of testimony and other evidence establishing that Arnold Primak of Machinery Maintenance - not FIA - supplied Distel Tool with the certificate of insurance originally issued to David Friedman, Inc. on 3/6/98; and,

2. Plaintiff itself directly introduced evidence that Arnold Primak of Machinery Maintenance - not FIA - supplied Distel Tool with a certificate of insurance.

(Tr. 2/22/02, pp 56-57, 102, 156-157, 165-167, 170-171, 179-180; 4/8/02, pp 17-18, 36, 38, 57-60; 6/19/02, pp 10, 16-17)

The Court of Appeals affirmed the Trial Court's findings of a duty and breach on the part of FIA, reasoning that Distel Tool's reliance upon the certificate was foreseeable by FIA even though "Farmington apparently did not deal with Distel and was not aware Distel existed until after the injury..." (Court of Appeals Opinion dated 12/7/04, p 3) In light of its affirmation of the judgment against FIA, the Court of Appeals declined to address as "immaterial," the arguments on cross-appeal raised by Michigan Tooling regarding the amendment of FIA's pleadings pursuant to MCR 2.118(C). (Court of Appeals Opinion dated 12/7/04, p 5)

On January 17, 2005, FIA filed a timely Application for Leave to Appeal, seeking the Supreme Court's review of the issues of:

1. Whether Michigan law on policies should recognize an insurance agency owes a duty of reasonable care with respect to the supplying of insurance information by the insured to unknown and unforeseeable users of that information; and,

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2. Whether the Trial Court and Court of Appeals erred as a matter of law by failing/ refusing to make findings of statutorily mandated comparative fault on the part of Plaintiff's subrogor, Distel Tool, and the Defendant, Machinery Maintenance Specialists, Inc., and commit a clear err by finding no fault on the part of the Third-Party Defendant Wausau Insurance Company.

Pursuant to MCR 7.302(D), Michigan Tooling was entitled to file, on or before February 14, 2005, an application for leave to appeal as cross-appellant the issue of whether the Trial Court abused its discretion by permitting FIA to amend its Answer during trial. No application for leave to appeal as a cross-appellant was filed on behalf of Michigan Tooling.

On October 7, 2005, this Court issued the following Order:

> On order of the court, the application for leave to appeal the December 7, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include upon the issues to be addressed at oral argument whether Farmington Insurance Agency owed a duty to Distel in relation to the certificate of insurance, where Farmington Insurance Agency did not send the certificate of insurance to Distel and otherwise had no contact with Distel. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatement of arguments and application papers.

On October 27, 2005, FIA filed a Supplemental Brief citing several additional cases supporting its position that the Trial Court and Court of Appeals erred as a matter of law and policy by imposing a common law duty of care against FIA and in favor of Distel Tool.

On November 4, 2005, Michigan Tooling filed a Supplemental Brief within which Michigan Tooling asserted that:

1. This Court is operating under the "mistaken belief" that there was no contact between Distel Tool and Farmington Insurance Agency; and,

2. Before any relief is granted to FIA, the Supreme Court must either: remand the case to the Court of Appeals for plenary consideration of the issue of whether the Trial Court erred by

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permitting FIA to amend its Answer to conform to the proofs at trial; or, permit Michigan Tooling to "pursue this argument anew" before the Supreme Court.

The Defendant-Appellant, Farmington Insurance Agency now submits its reply to the Supplemental Brief submitted on behalf of the Plaintiff-Appellee.

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REPLY ARGUMENT I:

PLAINTIFF-APPELLEE MICHIGAN TOOLING HAS FAILED TO PRESERVE SUPREME COURT REVIEW OVER THE ISSUE OF WHETHER THE TRIAL COURT ERRED BY GRANTING FARMINGTON INSURANCE AGENCY LEAVE TO AMEND ITS ANSWER TO CONFORM TO THE PROOFS AT TRIAL, AND WHETHER THE COURT OF APPEALS ERRED BY DECLINING TO ADDRESS THE ISSUE AS UNNECESSARY GIVEN ITS AFFIRMATION OF THE FINAL JUDGMENT IN FAVOR OF PLAINTIFF.

In its Supplemental Brief, Michigan Tooling asserts that, before this Court grants any relief to the Defendant-Appellant, FIA, it must first permit Michigan Tooling to "pursue anew" the issue of whether the Trial Court erred by permitting FIA to amend its Answer at trial to conform to the proofs. Apparently, Michigan Tooling is now willing to "allow" this Court to either consider whether the Trial Court abused its discretion under MCR 2.118(C), or to return the case to the Court of Appeals for "plenary consideration" of this issue. Obviously, in light of this Court's Order of October 7, 2005, Michigan Tooling is desperate for the opportunity to argue that the Trial Court erred by permitting FIA to withdraw an early and inadvertent admission that it directly supplied the certificate to Distel Tool.

However, a review of the relevant portions of the record within the context of the Michigan Court Rules and case law precedent reveals that Michigan Tooling failed to preserve Supreme Court review of the Trial Court's decision to grant leave to amend FIA's Answer.

MCR 7.302 governs cross-appeals in the Michigan Supreme Court and states as follows with emphasis supplied:

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(D) Opposing Brief; Cross-Appeal.

* * *

(2) An application for leave to appeal as cross-appellant may be filed with the clerk within 28 days after the appellant's application is filed. Late applications will not be accepted. The application must comply with subrule (A).

MCR 7.302(D)(2).

As a general proposition, court rules like statutes, are to be construed in a manner that gives effect to the plain, common and/or unambiguous language, without judicial construction or application. In re: KH, et al, 469 Mich 621, 628; 677 NW2d 800 (2000); Pierce v City of Lansing, 265 Mich App 174, 182; 694 NW2d 65 (2005).

The strict guidelines and timelines regarding invocation of discretionary Supreme Court review over issues raised on cross appeal reflected in MCR 7.302(D)(2), are consistent with case law precedent acknowledging that the State's highest court will firmly limit it's narrow review to those issues specifically and timely preserved in applications by the parties. Specifically, this Court has historically refused to allow an appellee who has not filed a cross appeal to obtain a decision more favorable than that rendered by the lower tribunal, as distinguished from arguments suggesting other bases for affirming the lower tribunal. Pulver v Dundee Cement Company, 445 Mich 68, 70 fn2; 515 NW2d 728 (1994); McCardel v Smolen, 404 Mich 89, 94-95; 273 NW2d 3 (1978); Bane v Township of Pontiac, 343 Mich 481, 484; 72 NW2d 134 (1955); Peters v Aetna Life Ins. Co, 282 Mich 426, 430; 276 NW 504 (1937). Likewise, the Court of Appeals has refused to consider an appellee's attacks upon unfavorable trial court rulings in the absence of perfected claims on cross-appeal. Prentis Family Foundation, Inc v Barbra Ann Karmanos Cancer Institute, 266 Mich App 39, 60; 698 NW2d 900 (2005), lv. den. 474 Mich 871; 703 NW2d 816 (2005); Conagra, Inc v Farmers State Bank, 237 Mich App 109, 140; 602 NW2d 390 (1999); Shipman v Fontaine Truck Equipment Co, 184 Mich App 706, 714; 459 NW2d 30 (1990), appeal dismissed (5/2/91).

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In its Supplemental Brief, Plaintiff-Appellee, Michigan Tooling, does not limit its arguments to grounds for affirmation of the determinations by the Court of Appeals and Trial Court to impose a duty of care upon FIA in favor of Distel. Rather, Michigan Tooling seeks more favorable determinations by this Court via:

1. "Correction" of the "misapprehension" of the Trial Court and Court of Appeals regarding who supplied the certificate of insurance to Distel Tool; and,

2. Reversal of the Trial Court's decision to allow FIA to withdraw an early and inadvertent admission that it directly supply the certificate to Distel Tool.

However, with respect to the lower courts purported errors regarding the fact of how Distel Tool obtained the certificate of insurance, the record reveals that Michigan Tooling never timely filed either a claim of cross-appeal with the Court of Appeals or an application for leave to file a cross-appeal with the Supreme Court. Therefore, Michigan Tooling's attacks upon the lower court's factual dispositions are not now preserved for review by this Court. Pulver, supra; McCardel, supra; Bane, supra; Peters, supra; Prentis Family Foundation, supra; Conagra, supra; Shipman, supra.

More significantly, Michigan Tooling has failed to preserve Supreme Court review of the Trial Court order permitting FIA to amend its Answer to conform to the evidence at trial, to wit: evidence that Arnold Primak of Machinery Maintenance, not FIA, directly supplied the certificate of insurance to Distel Tool. While Michigan Tooling did preserve appellate review by the Court of Appeals of this issue via a timely claim of cross-appeal, this Plaintiff-Appellee elected not to seek review by the Supreme Court after the Court of Appeals affirmed the judgment in its favor.

It is plain then, that only Michigan Tooling is operating under a "mistaken belief"; to wit: a belief that this Supreme Court would deny FIA's application and, therefore, Michigan Tooling could safely abandon its cross-appeal.

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Whatever the reason for Michigan Tooling's appellate pleading strategy, the bottom line is that Michigan Tooling did not file a timely application for leave to cross-appeal the grant of leave to FIA to amend its Answer pursuant to MCR 2.118(C), an issue separately raised, addressed and rejected by the Trial Court, and separately addressed and skirted by the Court of Appeals. Additionally, the Michigan Court Rules do not allow this Court to accept Michigan Tooling's now untimely pleas for relief on arguments that were required to be raised via a properly filed application for leave to cross appeal. MCR 7.302(D)(2).

Therefore, this Court should reject without consideration, Michigan Tooling's arguments with respect to the issues of who, in fact, supplied the certificate of insurance to Distel Tool, and whether the Trial Court abused its discretion in permitting Farmington Insurance Agency to amend its Answer to conform to the proofs at trial.[1]

---

[1] Even if this Court were to address the unpreserved appellate arguments regarding the amendment of FIA's Answer, there is absolutely no merit to Plaintiff's assertions of abuse of discretion.

MCR 2.118(C) governs the amendment of pleadings at trial and states:

RULE **2.118** AMENDED AND SUPPLEMENTAL PLEADINGS

* * *

(C) Amendments to Conform to the Evidence.

(1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

Subrule (C)(1) applies to situations where a party seeks leave to amend pleadings to incorporate issues already tried by the parties. This sub-rule does not require the moving party to demonstrate that the other party would not be prejudiced by the amendment of the pleadings at trial. Zdrojewski v Murphy, 254 Mich App 50, 61; 657 NW2d 721 (2003). Rather, subrule (C)(1) has long been characterized as "liberal and

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In conclusion, the Defendant-Appellant, Farmington Insurance Agency respectfully requests this Court to review only those facts and arguments preserved for review by this Defendant-Appellant in its application for leave to appeal and/or as determined by the Court following the oral arguments ordered on October 7, 2005.

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permissive", treating issues tried by the consent of the parties as if actually raised by the pleadings. Zdrojewski, supra. See also: Grebner v Clinton Charter Twp, 216 Mich App 736, 744; 550 NW2d 265 (1996); Goins v Ford Motor Co, 131 Mich App 185, 195; 347 NW2d 184 (1983). Indeed, the Michigan courts have consistently noted that the only requirements under (C)(1) are that the issues be tried by the consent of the parties, and that a formal motion to amend be made. Zdrojewski, supra; Grebner, supra; Goins, supra.

MCR 2.118(C)(1) expressly recognizes that the consent to try an issue may be express or implied; subrule (C)(1) will apply where the non-moving party fails to object to the admission of evidence, thus impliedly consenting to litigation of the issue raised by the evidence. Zdrojewski, supra; Grebner, supra; Goins, supra. Significantly, in Zdrojewski, the Michigan Court of Appeals specifically held that, where the non-moving party fails to object to the introduction of evidence, subrule (C)(1) and not subrule (C)(2) applies to the at-trial amendment of pleadings to conform to the evidence - even where the non-moving party objects to the amendment. Id.

The record below reveals that Plaintiff Michigan Tooling did not object to the admission of testimony and other evidence regarding the issue of whether MMS - and not FIA - supplied Distel Tool with a certificate of Insurance in March of 1998 (Tr. 2/22/02, pp 102, 156-157, 165-167, 170-171; 4/8/02, pp 57, 59-60). **Indeed, not only did Plaintiff fail to object to the admission of such evidence by FIA and Wausau, Plaintiff itself directly introduced such evidence via the questioning of all the key "players"; namely: Arnold Primak of MMS, David Clappison and Rebecca Steingold of FIA, and Richard Distel of Distel Tool!** (Tr. 2/22/02, pp 56-57, 179-180; 4/8/02, pp 17-18, 36, 38; 6/19/92, pp 10, 16-17).

Therefore, the Trial Court acted fully within its discretion when granting FIA's motion to amend its pleadings to conform to the evidence produced by all the parties - including Plaintiff - at trial regarding the issue of whether MMS or FIA supplied the Certificate of Insurance to Distel Tool.

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REPLY ARGUMENT II:

THE DEFENDANT-APPELLANT FARMINGTON INSURANCE AGENCY DID NOT WAIVE REVIEW OF THE ISSUE OF WHETHER A DUTY OF CARE MAY BE IMPOSED IN FAVOR OF PLAINTIFF'S SUBROGOR, DISTEL TOOL, DUE TO AN "INDIRECT" RELATIONSHIP CREATED BY THE MICHIGAN WORKERS COMPENSATION ACT AND PLACEMENT FACILITY HANDBOOK.

In its Supplemental Brief, Michigan Tooling also argues that FIA has not challenged whether the Trial Court and Court of Appeals correctly reasoned that an "indirect" and therefore sufficient, relationship existed between FIA and Distel Tool under Michigan's Workers' Compensation Statutes and Placement Facility Handbook so as to justify the imposition of a duty of care.

Once again, Michigan Tooling's arguments are factually incorrect.

In its Court of Appeals brief and application for leave filed with this court, FIA consistently and extensively attack the lower courts' analysis of duty as contrary to both binding and persuasive case law and policy considerations. (See i.e., application for leave to appeal pp 30-34) Suffice it to say at this juncture that the "indirect relationship" justification advocated by the Plaintiff-Appellee must be rejected in light of the fact that:

1. Creating yet an addition and separate duty of care on the part of insurance agents to all potential certificate holders would undeniably thrust the agents into unwanted fiduciary relationships fraught with potential conflicts of interest regarding the agent's loyalty to their clients, the insureds; and,

2. Given the Michigan legislatures already expressed interest in and involvement with the workers' liability compensation system, and the civil liability imposed upon various parties involved in the system, it would be best left to the legislature to either create a broad public duty of care upon insurance agents in favor of any recipient of a certificate of workers compensation liability

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insurance, or a right of action/subrogation by a statutory employer/carrier against an insurance agent who allegedly negligently issues a certificate of insurance.

In conclusion, the Defendant-Appellant, Farmington Insurance Agency respectfully requests this Court to review those facts and arguments preserved for review by this Defendant-Appellant in its application for leave to appeal and/or as determined by the Court following the oral arguments ordered on October 7, 2005.

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REPLY ARGUMENT III:

THE COURT OF APPEALS CLEARLY ERRED AS A MATTER OF LAW BY CONCLUDING THAT DISTEL TOOL REASONABLY RELIED UPON THE CERTIFICATE OF INSURANCE AND THAT IT WAS FORESEEABLE BY FIA THAT DISTEL TOOL WOULD BE HARMED BY NEGLIGENT ISSUANCE OF THE CERTIFICATE.

In its Supplemental Brief, Michigan Tool argues that there was no evidence of unreasonable reliance by Distel Tool upon the copy of the certificate of insurance issued to David Friedman. The facetiousness of this argument is clearly demonstrated in the comprehensive and objective review of the actual proofs at trial set forth in the application for leave submitted on behalf of FIA. At this point, it is worth emphasizing that Plaintiff's own insurance expert, Lawrence Polec, testified it was unreasonable for Distel Tool to rely in April of 1998 upon the certificate issued to David Friedman in March of 1998, especially since Distel Tool's receipt of the certificate was unknown to FIA. (Tr. 4/8/02, pp 173, 176, 213)

There is equally no merit to Michigan Tooling's equating of a certificate of workers' compensation insurance with proof of no fault insurance to support its argument that it is eminently foreseeable that unknown third parties will rely upon certificates issued previously to other parties as a guarantee that insurance is currently in effect. Again, as is already established in FIA's application for leave, the record at trial established that:

1. It is an unacceptable industry practice for an insurance certificate issued to one holder to be supplied to another, unnamed entity, or for blank certificates to be issued and disseminated at the insured's convenience; and

2. It is unreasonable for an unnamed third party to rely on a certificate issued previously to a named party.

(Tr. 2/22/02, pp 167-168; 4/8/02, pp 18, 36, 57, 173, 176; 6/19/02, pp 130-133; 8/28/02, p 98)

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Indeed, while in the context of the scope of the duty owed by an insurance carrier to a third party recipient of a certificate of insurance from an independent agent, the Court of Appeals in West American Insurance Co v Meridian Mutual Insurance Co, 230 Mich App 305; 583 NW2d 548 (1998), specifically recognized that the "stated purpose" of certificates of insurance is "merely to certify that the listed insurance policy had been issued" and that the certificates do "not purport to represent the terms, benefits, or privileges promised under the policy." Id. at 311. Indeed, citing to Colorado and New Hampshire decisions addressing the scope of the duty owed by insurance agents to known recipients of certificates of insurance, the West American Court expressly adopted the view that certificates of insurance are "worthless" documents that promise nothing more than insurance existed on the day the certificate was issued:

> Appellate courts in Colorado and New Hampshire have addressed similar issues. See ***Broderick Investment Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264 (Colo.App., 1990)**; ***Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency, Inc.*, 136 N.H. 1, 609 A.2d 1233 (1992)**. In both cases, the plaintiffs relied on certificates of insurance and were injured when the persons listed on the certificates did not actually have the coverage listed on the certificates. Unlike in this case, however, the plaintiffs in *Broderick* and *Bradley* sued the insurance agencies *issuing* the certificates of insurance. Both courts held that, under the circumstances, the agencies issuing the certificates of insurance were under no duty to advise the holders of the certificate about material changes in the information included on the certificates. *Broderick, supra* at 267; ***Bradley, supra* at 4, 609 A.2d 1233**. Relying on *Broderick, supra* at 266, the *Bradley* court reasoned that disclaimers on the certificate of insurance (which were nearly identical to the disclaimers on the certificate of insurance in this case) rendered it a "worthless document" which did "no more than certify that insurance existed on the day the certificate was issued." ***Bradley, supra* at 4, 609 A.2d 1233**. We agree with the reasoning of these courts, and conclude, for all the reasons stated above, that Meridian was under no duty to advise Ann Arbor Carpets about any inaccuracies in, or subsequent changes to, the information contained in the certificate of insurance issued by Floormaster's agent on Floormaster's behalf.

Id. at 312-313.

In conclusion, for the reasons stated herein and in its Application for Leave and Supplemental Brief, the Defendant-Appellant FIA submits that the Court of Appeals below clearly erred by

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limiting its analysis of the threshold issue of duty to the fact of foreseeability of third party injury alone. Therefore, FIA respectfully requests this Court to either peremptorily reverse the Court of Appeals, or grant FIA's application for leave to consider this issue on the merits.

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CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this Reply Brief, as well as the Application for Leave and Supplemental Brief filed pursuant to this Court's Order of October 7, 2005, the Defendant-Appellant Farmington Insurance Agency, LLC, respectfully requests this Honorable Court to either peremptorily reverse the Court of Appeals Opinion dated December 7, 2004, or grant leave to appeal the issues raised in the Application for Lease submitted by Farmington Insurance Agency, only.

Respectfully submitted,

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